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EXPRESS WARRANTIES IN SALES OF PERSONAL PROPERTY IN THE UNITED STATES AND CANADA.

WE have recently examined the law relating to the subject of the "Warranties implied in Sales of Personal Property in the United States and Canada," (22 Am. Law Reg. 85), and it is now intended to consider the legal principles that are applicable to the subject of express warranties, as laid down by the American and Canadian courts, in sales of a similar nature, the English authorities being ably reviewed by Mr. Benjamin, Q. C., in his work on Sales.

It will be convenient to examine the subject of express warranties with reference to,

I. THE PARTIES TO THE CONTRACT OF WARRANTY; PRINCIPAL AND AGENT.

- (a) *Creation of the contract of warranty by the agent.*
- (b) *Effect of the contract of warranty on the parties.*
- (c) *Scope of the agent's authority to warrant.*

II. THE CONTRACT OF WARRANTY.

- (a) *Sales.*
- (b) *Exchanges.*

III. THE REMEDIES OF THE PARTIES.

- (a) *Remedies of the buyer; avoidance of the contract for fraud of the seller.*
- (b) *Action for breach of warranty.*

IV. MEASURE OF DAMAGE.

I. THE PARTIES ; PRINCIPAL AND AGENT.

Any one, as a general rule, who can make a valid contract of sale, may likewise make the collateral contract of warranty, and, for the principles of law applicable to the parties to a contract of sale, the reader is referred to some treatise on sales, as for example, the very valuable work of Mr. Benjamin, at Chapter II.

A contract of warranty, however, may be made by the agent of the principal, as well as by the principal himself, and we shall endeavor to present the principles which are contained in the cases relative to the subject of agency in connection with warranties.

(a) *The creation of the contract of warranty.*—The agency in a contract of warranty is created in pretty much the same manner as in a contract of sale, and it has been repeatedly held that the mere authority to sell implies also the power to warrant, on the ground that when authority is given to do an act, it includes the power to do everything usual and necessary to the accomplishment of it: *Skinner v. Gunn*, 9 Porter (Ala.) 306; *Bradford v. Bush*, 10 Ala. 390; *Gaines v. McKinley*, 1 Id. 446; *Boothby v. Scales*, 27 Wisc. 635; *Ezell v. Franklin*, 2 Sneed (Tenn.) 236; *Lane v. Dudley*, 2 Murphy (N. C.) 119; *Peters v. Farnsworth*, 15 Vt. 155; *Woodford v. McClenahan*, 4 Gil. (Ill.) 85; *Murray v. Brooks*, 41 Iowa 45; *Randall v. Kehlror*, 60 Me. 37; *Palmer v. Hatch*, 46 Mo. 585; *Hunter v. Jameson*, 6 Ired. (N. C.) 252; *Nelson v. Cowing*, 6 Hill 336. In some cases, however, a distinction has been taken between a general and special power of agency with respect to warranties, and it has been occasionally decided that a naked authority given to a special agent to sell does not imply a power to warrant also; though the cases conflict.

One of the earliest American cases upon the subject is *Lane v. Dudley*, 2 Murphy (N. C.) 119 [1812], in which it was said, by TAYLOR, C. J., citing a dictum of ASHHURST, J., in *Fenn v. Harrison*, 3 T. R. 757, that an authority to warrant a horse is within the scope of an authority to sell.

In *Skinner v. Gunn*, 9 Porter (Ala.) 305 [1839], the court intimated the same thing, and cited *Fenn v. Harrison*, *supra*; *Helyear v. Hawke*, 5 Esp. 72, and *Alexander v. Gibson*, 2 Campb. 555. After this, came *Gaines v. McKinley*, 1 Ala. 446; *Cocke v. Campbell*, 13 Ala. 286, and *Bradford v. Bush*, 10 Ala. 386; approving the principles of the above decision.

In *Tice v. Gallup*, 2 Hun (N. Y.) 446, the court held that a special agent authorized to sell a horse might warrant its age, &c., and in *Ezell v. Franklin*, 2 Sneed (Tenn.) 236, the authority to sell a slave was held to include the power to warrant, and *Fenn v. Harrison*, was cited.

In *Nelson v. Cowing* 6 Hill (N. Y.) 336 [1844], the same rule was adopted; BRONSON, J., said: "But a warranty—and so of a representation—is one of the usual means for effecting the sale of a chattel; and when the owner sells by an agent, it may be presumed in the absence of all proof to the contrary, that the agent has been clothed with all the usual powers for accomplishing the proposed end. So long as the agent is acting within the general scope of his authority, persons dealing with him are considered as dealing with the principal. I will not stop to inquire whether, *David* is to be regarded as a general or special agent; for if he was only a special agent, his authority to warrant the quality or condition of the thing sold would be presumed until the contrary appeared: *Fenn v. Harrison*, 4 T. R. 177; *Sandford v. Handy*, 23 Wend. (N. Y.) 260." See also *Peters v. Farnsworth*, 15 Vt. 160, and *Upton v. Suffolk Co., &c.*, 11 Cush. (Mass.) 586.

In *Bryant v. Moore*, 26 Me. 84, however, a warranty of oxen by a special agent was held to be invalid as against the principal. And in *Croom v. Shaw*, 1 Florida 216, the court said: "*Oliver* in this case seems to have acted as a *special* agent of *Croom*, and not as a *general* agent. He had, as would appear by the evidence, a power to *sell*, but there is nothing to show that he had authority to *warrant*."

In *Cooley v. Perrine*, 12 Vroom (N. J.) 322 [1879], the subject was discussed at considerable length by DIXON, J., who held that a special agent authorized to sell a horse, was not, in consequence, empowered to make a warranty as to his soundness. The court said, the agent "was clearly only a *special* agent, * * * his instructions were to sell a certain horse to a designated person at a fixed price. Herein, the only term subject to any appearance of ambiguity or indefiniteness, was the direction to *sell*. * * * A sale of a chattel is a transfer of its title by the vendor to the vendee for a price paid or promised: 1 Parsons on Contracts, 519. A direction to sell, therefore, nothing more appearing, would confer upon a special agent no authority beyond that of agreeing with the purchaser, in regard to these component particu-

lars. Under certain circumstances a sale legally imports more than these particulars, and in such cases the authority under a power to sell would be correspondingly enlarged. Thus, if a sale be made by sample, it is thereby impliedly warranted that the bulk is of as good a quality as the sample. Hence, it has been properly held, that where a broker was empowered to sell goods which were in bulk, and, by the custom of brokers, it was permissible to sell such goods by sample, and he was not restricted as to the mode of sale, his sale by sample, and the warranty of quality therein implied, was binding upon his principal. *The Monte Allegre*, 9 Wheat. 616; *Andrews v. Kneeland*, 6 Cowen 354; *Schuchardt v. Allens*, 1 Wall. 359. But in the sale of a horse, subject to the buyers' inspection, no warranty of quality is implied, and it seems a short and clear deduction of reasoning thence to conclude that in an authority to make such a sale, no authority so to warrant is implied. The warranty is outside of the sale, and he who is empowered to make the warranty must have some other power than that to sell." And the learned judge, in conclusion, said that all the cases the other way, so far as he was aware, rested on the authority of *Fenn v. Harrison*, *supra*; *Helyear v. Hawke*, *supra*; and *Alexander v. Gibson*, *supra*, and "they no longer have any foundations on authority—since these three cases, if they ever applied to a special agency, are now in that respect distinctly overruled by *Brady v. Todd*, 9 C. B. (N. S.) 592; a decision fore-showed by CRESSWELL, J., when in *Coleman v. Riches*, 16 C. B. 104, [1855], he asked counsel, citing 2 Camp. 555, 'would you hold that to be good law at the present day.'" In such conflict of opinion, it is difficult to lay down a rule. Where one acts in a representative capacity as a sheriff or auctioneer, no authority to warrant is implied. Thus in *Mink v. Jarvis*, 8 U. C. Q. B. 397, the question arose as to whether the sheriff's deputy could bind his principal by a warranty that the goods belonged to the debtor, on a writ of *fiery facias*. The court thought he could not, but were doubtful.

In *Blood v. French*, 9 Gray (Mass.) 198, BIGELOW, J., said: "we doubt, whether in an ordinary sale of goods by auction, an auctioneer *virtute officii*, has any right or authority to warrant goods sold by him, in the absense of any express authority from his principal to do so, and without proof of some known and established usage of trade, from which an authority can be implied.

* * * However this may be, we are clear that he has no such authority in a case like this, where he acts as agent for an administrator in selling the goods of his intestate. The nature of the sale and the representative capacity in which the vendor acts in employing the auctioneer, preclude any implied right or authority in the latter to make a warranty, binding on the administrator personally, of the soundness of the article sold."

Sometimes the right of the agent to warrant is implied from a usage of the trade: *The Monte Allegre*, 9 Wheat. 616; *Andrews v. Kneeland*, 6 Cowen (N. Y.) 354; *Pearson v. Stoddard*, 9 Gray (Mass.) 199; but such usage must be a reasonable one before the agent's right to warrant will be implied; as for example, in *Dodd v. Farlow*, 11 Allen (Mass.) 426, where the court held, a usage that gives a broker an implied authority to warrant goods sold by him to be of a merchantable quality is inadmissible, and BIGELOW, C. J., remarked: "It is liable to the grave objection that it is unreasonable, and so contrary to the ordinary rules by which the relation of principal and agent is regulated, that it cannot be presumed to have been in contemplation of a vendor in employing a broker to make a sale of merchandise. Even if the usage was known to the vendor, he would have a right to disregard it, and disavow a contract made in conformity to it." See also Biddle on Stock Brokers, at page 94.

If one acts in behalf of another, it is immaterial as respects third parties, whether he does so by the direction or request of the principal, or by his permission merely: *Fayet al. v. Richmond*, 43 Vt. 25; and the principal is bound, if he ratify the acts of his agent which were not commanded originally by him to be performed: *Churchill v. Palmer*, 115 Mass. 311; *Hill v. North*, 34 Vt. 604; *Lane v. Dudley*, 2 Murphy (N. C.) 119; *Guilford v. Ashbaugh*, 44 Iowa 519.

(b) *Effect of the contract of warranty on the parties.*—In a contract of warranty the principal is bound by the statements and representations of his agent, acting within the scope of his authority: *Williamson v. Candaley*, 3 Ired. (N. C.) 349; *Ezell v. Franklin*, 2 Sneed (Tenn.) 242; and in the case of a private agency the agent's warranty is binding on the parties, if a usual one in the trade in which he is engaged (see cases *supra*), even if he violate therein the secret instructions of his employer: *Bryant v. Moore*, 26 Me. 87 [1847]; *Boothby v. Scales*, 27 Wisc. 635

[1878]. Where a warranty is made by the agent for an undisclosed principal, a suit will lie in the latter's name against the purchaser : *Ruiz v. Norton*, 4 Cal. 355 ; but if the agent covenant in his own name, and does not attempt to bind his principal during the treaty of sale, the latter will not be liable to the purchaser on the warranty unless he afterwards ratify it : *Skinner v. Gunn*, 9 Porter (Ala.) 308. Where the agent makes a false warranty, beyond the scope of his instructions, the principal by a ratification of it, renders himself liable to the purchaser, though not to the agent, unless the latter can show deceit on the principal's part : *Croom v. Shaw*, 1 Fla. 217. It is obvious that the fact of the agency must very clearly appear before the court will admit the representations or undertakings of the agent in evidence : *Applegate v. Moffitt*, 60 Ind. 104 ; *Skinner v. Gunn*, *supra*.

(c) *Scope of the agent's authority to warrant*.—Where the agent's instructions empower him to bind his principal by a warranty, it must appear that he has acted strictly within the scope of his authority—express or implied—before the warranty will be held valid.

Thus in *Upton v. Suffolk Co. Mills*, 11 Cushing (Mass.) 586, a general selling agent in Boston, warranted in the name of his principal that four thousand quarter barrels of flour sold by him would be of such a character as to “insure its keeping sound on a voyage to San Francisco,” and it was held that the authority of the agent to sell did not authorize his making such a hazardous warranty, that the flour should keep sound during a long sea voyage, in which it must twice cross the equator. METCALF, J., remarked, “what is the extent of the implied authority of a general selling agent? * * * When one authorizes another to sell goods, he is presumed to authorize him to sell in the usual manner, and only in the usual manner, in which goods or things of that sort are sold : Story on Agency, § 60 ; see *Shaw v. Stone*, 1 Cush. 228. The usage of the business in which a general agent is employed furnishes the rule by which his authority is measured. Hence, a general selling agent has authority to sell on credit, and to warrant the soundness of the article sold, when such is the usage : *Goodenow v. Tyler*, 7 Mass. 36 ; *Alexander v. Gibson*, 2 Campb. 555 ; *Nelson v. Cowing*, 6 Hill 336 ; 2 Kent Com. (6th ed.) 622 ; Russell on Factors 58 ; Smith on Master and Servant 128, 129. But as stocks and goods sent to auction are not usually

sold on credit, a stockbroker or auctioneer has no authority so to sell them, unless he has the owner's express direction or consent : *Wiltshire v. Sims*, 1 Campb. 258 ; 3 Chit. Law of Com. and Man. 205 ; 1 Bell Com. 388 ; and it was said by Mr. Justice THOMPSON, (9 Wheat. 647), that auctioneers have only authority to sell, and not to warrant, unless specially instructed so to do. As there is no evidence nor suggestion of a usage to sell flour with the hazardous warranty that it shall keep sweet during a sea voyage, in which it must twice cross the equator, we deem it quite clear that nothing short of an express authority conferred on the agent, would empower him to bind them by such a warranty."

In *Palmer v. Hatch*, 46 Mo. 585, the selling agent warranted against a seizure by the government under the revenue laws. The court, while admitting the doctrine of the right of the selling agent to warrant the quality or condition of the article sold, said : " But the warranty counted upon in the plaintiff's petition, as we have seen, is not of that character ; it extends to and assumes to warrant the plaintiffs against gratuitous and unwarrantable interferences with the subject of the sale. Such warranties, it is apprehended, are of rare occurrence. The authority of an agent to make them is not inferable from a naked general authority to sell."

And in *Richmond, &c., Co., v. Farquar*, 8 Blackf. (Ind.) 89, it was held, that the power given by the seller of certain sacks of wool, to one to weigh and deliver them does not authorize him to warrant as to the quality of the wool. See also *Smith v. Tracy*, 36 N. Y. 79 ; *Dodd v. Farlow*, *supra*.

When the contract of sale and warranty is completed, the authority of the agent usually ends, for " it does not follow that if a person is authorized to sell the property, his agency continues, so as to permit him to rescind the sale or adjust the damages which the vendee may sustain by a breach of the warranty. The transaction is complete by the sale, and the rights of the parties have become vested, the one in the thing sold, and the other in the price." Per COLLIER, C. J., in *Bradford v. Bush*, 10 Ala. 387.

II. THE CONTRACT OF WARRANTY.

(a) *Sales*.—It is not necessary, in order to constitute a warranty, that the seller should use the word " warrant : " *Hawkins v. Pemberton*, 51 N. Y. 198 ; *Roberts v. Morgan*, 2 Cow. (N. Y.) 438 ;

O'Neal v. Bacon, 1 Houst. (Del.) 219; *Weimer v. Clement*, 37 Pa. St. 147; *Randall v. Thornton*, 43 Me. 226; *Osgood v. Lewis*, 2 H. & G. (Md.) 495; *Patrick v. Leach*, 8 Neb. 530; *Kinley v. Fitzpatrick*, 4 How. (Miss.) 59; *Hawkins v. Berry*, 10 Ill. 39; *Carter v. Black*, 46 Mo. 385; and no particular form of words is necessary: *Weimer v. Clement*, 37 Pa. St. 147; *Blythe v. Speake*, 23 Texas 429; *Carter v. Black*, 46 Mo. 384; but any positive and unequivocal representation or affirmation made by the seller during the treaty of sale with respect to the subject-matter thereof, upon which the buyer would naturally be induced to rely, and upon which he actually does rely in making his purchase, is sufficient to constitute a warranty. See *Hastings v. Lovering*, 2 Pick. (Mass.) 214; *Henshaw v. Robins*, 9 Metc. (Mass.) 88; *Blythe v. Speake*, 23 Texas 429; *Bishop v. Small*, 63 Me. 12; *Beeman v. Buck*, 3 Vt. 53; *Carley v. Wilkins*, 6 Barb. (N. Y.) 557; *Chapman v. Murch*, 19 John. (N. Y.) 290; *Durfee v. Mason*, 8 Cowen (N. Y.) 25; *McFarland v. Newman*, 9 Watts (Pa.) 55; *McGregor v. Penn*, 9 Yerger (Tenn.) 74; *Ottis v. Alderson*, 10 Sm. & M. (Miss.) 476; *Sweet v. Colgate*, 20 John. (N. Y.) 203; *Thorne v. McVeagh*, 75 Ill. 81; *Little v. Woodworth*, 8 Neb. 281; *Wilbur v. Cartright*, 44 Barb. (N. Y.) 536; *Weimer v. Clement*, 37 Pa. St. 147.

It follows, therefore, from what has just been said, that a mere expression of opinion by the seller as to the value or quality of his goods, or expressions used by him for the purpose of "puffing" his wares, or words of description, do not constitute a warranty.

Thus, in *Horton v. Green*, 66 N. C. 596, in an action for a breach of warranty, it appeared that the plaintiff said, "What will you take for your mule?" defendant replied, "\$125." Plaintiff then rejoined, "I can't give \$125, but if it is all sound and all right, I'll give \$100." Defendant then said, "It is all sound and all right, and I will take \$100, if you will pay the money down." Plaintiff then said, "I cannot pay the money down, but I'll give \$25 down and a note for the balance," to which defendant assented. The court was requested to instruct the jury that what defendant said was a warranty in law; but the court refused, and left the question to the jury to decide, and the action of the court was upheld on appeal. So in *Willard v. Stevens*, 24 N. H. 271, plaintiff offered the following note in evidence, "Bought one red horse six years old, for one hundred and twenty-five dollars, which I war-

rant sound and kind," and contended that the note was a warranty of the age of the horse as well as of his soundness. But the court held that the warranty did not extend to the horse's age, but that the words, "six years old," were matter of description only. EASTMAN, J., said, "in order to make the warranty apply to the age, the contract must be divided. It must be held that the intention was, first, to warrant the age by implication, and then to make an express warranty of the soundness and kindness." In *Morrill v. Wallace*, 9 N. H. 111, plaintiff purchased eight hundred and forty-eight pounds of lean pork, inquiring at the same time of the plaintiff whether it was good, as there appeared to be some unfavorable appearances in it. Defendant stated that it was good, and was not aware at the time of the fact of its being tainted. In an action, the pork turning out bad, the court instructed the jury that this constituted a warranty, and on appeal a new trial was granted, as the judge who tried the case thought it should have been left to the jury to say whether the expressions of the vendor were a warranty or merely an expression of judgment, though the rest of the court thought the verdict might be supported.

See, also, *Smith v. Justice*, 13 Wisc. 600; *Kerr v. Shrader*, 1 Weekly Notes of Cases (Phila.), 33; *Beals v. Olmstead*, 24 Vt. 115; *Baird v. Matthews*, 6 Dana (Ky.) 131; *Towell v. Gatewood*, 2 Scam. (Ill.) 22; *Hillman v. Wilcox*, 30 Me. 170; *Foggart v. Blackweller*, 4 Ired. 238; *Wolcott v. Mount*, 38 N. J. 496; *Baum v. Stevens*, 2 Ired. (N. C.) 411; *Clark v. Ralls*, 50 Iowa 275; *Greenthal v. Schneider*, 52 How. Pr. (N. Y.) 133; *Inge v. Bond*, 3 Hawks (N. C.) 101; *Byrne v. Jansen*, 50 Cal. 624; *Ayres v. Parks*, 3 Hawks (N. C.) 59; *Jackson v. Crane*, 61 Ga. 392; *McFarland v. Newman*, 9 Watts (Pa.) 55; *Baker v. Fawkes*, 35 U. C. Q. B. 302; *Bryce v. Parker*, 11 S. C. 337; *Swett v. Colgate*, 20 John. (N. Y.) 203.

It also follows that the contract of warranty must be made pending the treaty of sale, and therefore any representations made prior to the treaty as mere inducement to buy, will not be held to constitute a warranty, as thus for example in *Jackson v. Wetherill*, 7 S. & R. (Pa.) 480, the seller of a mare said repeatedly to the buyer before the sale that he was "sure she was perfectly safe, kind and gentle in harness," and in an action on the warranty, the court, on appeal, held these words not to constitute a warranty; and DUNCAN, J., said the seller "might have very truly said that he

was sure she was perfectly gentle in harness without any deceit. It was an expression and a pretty strong one, I admit, of his judgment and opinion, and, if the contrary were known to him, would give a cause of action very different from a warranty." See, also, *Craig v. Miller*, 22 U. C. C. P. 348. Where the contract of sale is reduced to writing, all prior representations are considered to be merged in the written contract, and parol evidence will not be admitted to vary or add to the written instrument. An illustration of this principle is had in *Randall & Co. v. Rhodes*, 1 Curt. C. C. 90. Here R. & Co. purchased of Rhodes, through Brown, Rhodes' agent, the bark *Baltic*, supposing it to be of white oak, as Brown asserted to them that it was, and the following note was signed by the buyer, and a similar one by the seller, viz.: "Sold to R. & Co. this day, through Brown, the bark *Baltic*, now at East Boston, for \$12,000, to be paid next Tuesday, as follows: * * * Full packages of beef, &c., to be taken out by the owners, all other small stores belonging to the vessel." The breach was that the vessel turned out not to be built of white oak. The notes were put in evidence, and plaintiffs attempted to prove the representations of Brown, which were rejected by the court, on the ground that the whole contract was embraced in the above notes. CURTIS, J., said: "Now, the general rule is, that when negotiations have terminated in a written contract, the parties thereby tacitly affirm that such writing contained the whole contract, and no new terms are allowed to be added to it by extraneous evidence. It is argued that this memorandum is not the written contract of sale; that it only contains a statement of the fact that a sale has been made and a description of the thing sold, the price and the terms of the credit. But this is all that is necessary to make a complete contract of sale; and to assume that anything more existed, and allow it to be shown, would violate the rule above stated. It is true, that in *Bradford v. Manly*, 13 Mass. R. 139, and *Hastings v. Lovering*, 2 Pick. 214, it was held that a bill of parcels was not the contract of sale, it being intended, as the court says, in the first of those cases, only as a receipt for the price and not to show the terms of the bargain. But here the writing could not have been intended for a receipt, and must have been intended to set forth, what it does set forth, a contract of sale, and if so, it must be taken to embrace the whole contract, and consequently a warranty was not one of its terms." See, also, *Lamb v. Crofts*,

12 Metc. (Mass.) 353; *Van Ostrand v. Reed*, 1 Wend. (N. Y.) 424; *Galpin v. Atwater*, 29 Con. 93; *Pender v. Fobes*, 1 D. & B. (N. C.) 250; *Bond v. Clark*, 35 Vt. 577; *Mullain v. Thomas*, 43 Vt. 252.

Where, however, the writing is a mere memorandum of the contract or receipt, and does not contain all the terms of the contract, parol evidence is admissible to explain or qualify, &c., the writing. Thus, in *Towell v. Gatewood*, 2 Scam. (Ill.) 23, the receipt ran: "Mr. E. H. Gatewood bought of H. & I. Towell, two thousand nine hundred and fifty-one pounds good, first and second rate tobacco at \$4.56, at \$132.79½. Received payment by the hands of L. Kirkham. H. T.—I. T.," and the court, on appeal, said they "could not consider the paper in question as containing the evidence of the bargain entered into by the parties. It possesses none of the constituent parts of a contract, but is, in form and in fact, a bill of parcels, and an acknowledgment of the receipt of the purchase-money, and as such was properly received in evidence; but it does not follow that because it is evidence as far as it goes, it is all the evidence that ought to be received." See, also, *Bradford v. Manly*, 13 Mass. 139; *Hastings v. Lovering*, 2 Pick. (Mass.) 214; *Hogins v. Plympton*, 11 Id. 97; *Filkins v. Whyland*, 24 Barb. (N. Y.) 379; *Mevrick v. Bradley*, 19 Md. 50. The following cases are a few illustrations of what writings the courts have held to be descriptive, and what to constitute a warranty.

In *Wason v. Rowe*, 16 Vt. 525, the bill of sale was: "W. bought of E. R., one bay horse, five years old last July, *considered sound*. Price \$65. Received payment, E. R.," and was held not to constitute a warranty of soundness.

In *Howell v. Cowles*, 6 Grat. (Va.) 393, H. hired a negro from C. to work for a year, and gave C. his bond, which bound the hirer to pay on a certain day, "\$135, being for the hire of a negro man, the present year, by the name of *Tom*, to work at boat business, said negro to be clothed," &c., and it was held the words *to work at boat business* were words of description merely.

But in *Cramer v. Bradshaw*, 10 John. (N. Y.) 484, where, by a bill of sale, B. bargained, sold, granted, &c., "a negro woman slave named, &c., *being of sound wind and limb, and free from all disease*," the court held these words not to be descriptive, but to be an averment of a fact, and in consequence to constitute a warranty of soundness.

So, also, a representation made subsequent to the sale, will not constitute a warranty, unless, indeed, there be a new consideration, as in *Congar v. Chamberlain*, 14 Wisc. 258, where A., having agreed to deliver fruit trees to B. early in the fall, to be sent to certain places in Minnesota before the frost set in, delivered them so late that B. refused to accept them, and thereupon A. assured B. that there was ample time to transport them before the frost, and that if they were frozen they would come out uninjured in the spring, if B. buried in a particular way, upon which B. agreed to take them, and the court held that this was a warranty founded on a good consideration. See, also, *Summers v. Vaughan*, 35 Ind. 323; *Towell v. Gatewood*, 2 Scam. (Ill.) 22; *Bloss v. Kittridge*, 5 Vt. 28; *Vincent v. Leland*, 100 Mass. 432.

It was held, however, in *Wilson v. Ferguson*, Cheves (S. C.) 190, that a warranty of soundness given after the sale was complete, being under seal, could not be impeached for want of consideration.

It has been frequently decided that a warranty does not extend to defects in the article sold that are plainly visible to the purchaser, or which would be visible to him if he should examine the article as an ordinarily prudent buyer should: *Palmer v. Skillenger*, 5 Harr. (Del.) 233; *Chadsey v. Greene*, 24 Conn. 562; *Scarborough v. Reynolds*, 13 Richardson 98; *House v. Fort*, 4 Blackf. (Ind.) 296; *Hill v. North*, 34 Vt. 604; *Williams v. Ingram*, 21 Texas 300; *Ricks v. Dillahunt*, 8 Port. (Ala.) 134; *Huston v. Plato*, 3 Col. 402; *Schuyler v. Russ*, 2 Caines Term R. (N. Y.) 202; *Vandewalker v. Osmer*, 65 Barb. (N. Y.) 556; *Richardson v. Johnson*, 1 La. Ann. 389; *Fisher v. Pollard*, 2 Head. (Tenn.) 314; *Dean v. Morey*, 33 Iowa 120; *Mulvany v. Rosenberger*, 18 Pa. St. 203; *Birdseye v. Frost*, 34 Barb. (N. Y.) 367; *Brown v. Bigelow*, 10 Allen (Mass.) 242.

But a seller may warrant against visible defects.

Thus in *Pinney v. Andrus*, 41 Vt. 631, it was held that a warranty against the foot-rot in sheep was valid, whether the existence of the disease was obvious or even known to the buyer when he made the purchase; and in *Kenner v. Harding*, 85 Ill. 264, where the seller of a mare and mule had them stabled together in a single stall, and assured the buyer, when about to examine them, that the mule was sound, upon which they were bought, and the mule's pastern joints at the time were crooked over, and it was

lame, the court held the warranty to extend to the lameness. See, also, 1 Parsons on Contracts, 576, note h.

It was formerly supposed that there could be no warranty against a future event, but it seems that now the law is otherwise, though it is difficult to find authorities that decide the point. On principle, there is apparently no reason why a man should not warrant against a future event.

In *Osborn v. Nicholson*, 13 Wall. 654, a slave-owner, in 1861, sold a slave, taking from the purchaser a note for \$1300, and the following bill of sale was executed: "For the consideration of \$1300, I hereby transfer all the right, title and interest I have to a negro boy named Albert, aged about twenty-three years. I warrant said negro to be sound in body and mind, *and a slave for life*; and I also warrant the title to said boy clear and perfect."

In 1869, on a suit on the note, the defendant pleaded the warranty, and that the warranty having been violated by the Thirteenth Amendment to the Constitution of the United States, which liberated the slave, the plaintiff ought not to recover. To this plaintiffs demurred, and the court overruled the demurrer. On appeal to the Supreme Court of the United States, the action of the lower court was reversed, and the Supreme Court held, the action lay, on the ground that though a warranty against a future event is valid, yet, an ordinary warranty of title and quiet possession, such as the above, never was contemplated to extend to and such sovereign act as the passage of the Thirteenth Amendment, and, therefore, was not violated by the loss of the slave, by virtue of the said amendment. The reader is also referred to the cases of *Hambricht v. Stover*, 31 Ga. 300; *Richardson v. Mason*, 53 Barb. (N. Y.) 601; *Leggat v. Sands, &c.*, 60 Ill. 158, which all seem to recognise the validity of a warranty of a future event.

A warranty is a question of intention, and it is the province of the jury to determine the weight and effect to be attached to the verbal affirmations and representations of the seller: *Ayres v. Parks*, 3 Hawks (N. C.) 60; *Baum v. Stevens*, 2 Ired. (N. C.) 411; *Alexander v. Dutton*, 58 N. H. 282; *Baker v. Fawkes*, 35 U. C. Q. B. 302; *Bennet v. Tregent*, 24 U. C. C. P. 565; *Boothby v. Scales*, 27 Wisc. 626; *Bradford v. Bush*, 10 Ala. 386; *Duffee v. Mason*, 8 Cowen (N. Y.) 25; *Chisholm v. Proudfoot*, 15 U. C. Q. B. 203; *Foggart v. Blackweller*, 4 Ired. (N. C.) 238; *Horn v. Buck*, 46 Md. 358; *Humphreys v. Comline*, 8 Blackf.

(Ind.) 516; *Henson v. King*, 3 Jones (N. C.) 419; *Foster v. Caldwell*, 18 Vt. 180; *Kinley v. Fitzpatrick*, 4 How. (Miss.) 59; *Murray v. Smith*, 4 Daly (N. Y.) 278; *McDonald v. Thomas*, 53 Iowa 559; *Morrill v. Wallace*, 9 N. H. 111; *McFarland v. Newman*, 9 Watts (Pa.) 57; *Rogers v. Ackerman*, 22 Barb. (N. Y.) 134; *Brown v. Bigelow*, 10 Allen (Mass.) 243; *Caldwell v. Wallace*, 4 S. & P. (Ala.) 282; *Duff v. Ivy*, 3 Stew. (Ala.) 140; *Cowan v. Silliman*, 4 Dev. (N. C.) 46; *McGregor v. Penn*, 9 Yerger (Tenn.) 74; *Cook v. Moseley*, 13 Wend. (N. Y.) 277; *Jack et al. v. R. R. Co.*, 53 Iowa 399; *Nelson v. Biggers*, 6 Ga. 205; *Thorne v. McVeagh*, 75 Ill. 81; *Warren v. Phila. &c., Co.*, 83 Pa. St. 437; *Horton v. Green*, 66 N. C. 596; *Starnes v. Erwin*, 10 Ired. (N. C.) 226. But where the contract has been reduced to writing it is usually a question for the court to pass upon its interpretation: *Horn v. Buck*, 48 Md. 358; *Osgood v. Lewis*, 2 H. & G. 495; *Claghorn v. Lingo*, 62 Ala. 230; *Wason v. Rowe*, 16 Vt. 525. The following cases are a few illustrations of the constructions of warranties: in *Blythe v. Speake*, 23 Texas 429, it was held that, a bill of sale, granting, &c., "a negro man, slave for life, by the name of Sam, about twenty-eight or thirty years old, sane and healthy (except one finger stiff), in mind and body," constituted a warranty of soundness; and that, though the bill concluded with a warranty applicable to title only: see *Duff v. Ivy*, *infra*.

In *Cook v. Moseley*, 13 Wend. (N. Y.) 277, Moseley asked Cook, *if the mare was lame*, and he answered *she was not lame, and that he would not be afraid to warrant her, that she was sound every way, as far as he knew*. In a suit for breach of warranty, the mare being proved to have been lame, the justice, before whom the case was heard, gave judgment for the plaintiff, which was affirmed by the Court of Common Pleas, and Court of Appeals, SUTHERLAND, J., saying, he thought enough was said to amount to a warranty.

In *Starnes v. Erwin*, 10 N. C. 226, plaintiff desiring to purchase an interest in a gold mine, asked the price, and defendant replied \$100, and said: "*but for the death of my wife, I would not take that price; if you buy, I will warrant you to make the money in ten days. Come up in a few days and we will look at it.*" Plaintiff said, *the shaft is full of water, I will buy it on your honor*. And defendant said, *if you will do the work I will war-*

rant you will make your money in ten days. Plaintiff said, *I will do it.* The jury found for the defendant, on a suit on the warranty, and on appeal this was upheld. The court remarked, that the judge below instructed the jury that if from the whole conversation, they should conclude "that the word *warrant* was used as a word of high commendation and praise, so as to induce the trade, and not as importing an undertaking to make good in damages if the money was not made in ten days, the defendant would not be liable in this action," and this was substantially correct.

In *McFarland v. Newman*, 9 Watts (Pa.) 55, the court below charged the jury that "a positive averment, made by the defendant at the time of the contract, of a material fact, is a warranty: *that it is part and parcel of the contract.*" Held on appeal to be error. GIBSON, J., said: "The naked averment of a fact is not a warranty, * * * the jury must be satisfied from the whole, that the vendor actually and not constructively consented to be bound for the truth of his representations, * * * but a naked affirmation is not to be dealt with as a warranty, merely because the vendee had gratuitously relied on it." See *Foster v. Caldwell*, 18 Vt. 176; but see also *Kenner v. Harding*, 85 Ill. 26.

In *Duff v. Ivy*, 3 Stew. (Ala.) 140, a receipt running: "Received of A. D., * * * for a negro named Charity, which I *warrant* and *defend* unto the said D.," was held to constitute a warranty of soundness and title; see, however, *Bowan v. Silleman*, 4 Ired. (N. C.) 46.

In *Stroud v. Pierce*, 6 Allen (Mass.) 416, the ruling of the court below was that, "a representation that *a piano-forte is well made and up to concert pitch*, is a representation of fact, which, if proved to be false, as between a seller making the representation and a buyer relying upon it, would authorize the buyer to recover." On appeal, CHAPMAN, J., said: "The word representation was undoubtedly used here as synonymous with affirmation, and there can be no doubt that such an affirmation is a warranty. * * * The defendant contends that it should have been left to the jury to find whether this language was used with the intention of affirming the fact, or of expressing an opinion. But the intent of the party is immaterial."

The following diseases have been considered to constitute a breach of warranty of soundness in the sales of horses: "The

navicular disease:" *Huston v. Plato*, 3 Col. 402; "blindness in one eye:" *House v. Fort*, 4 Blackf. (Ind.) 294; "defective eye:" *Burton v. Young*, 5 Harr. (Del.) 233; in short, "any disease, deformity or defect which renders the horse less fit for present use and convenience, and not openly and palpably visible," would probably amount to a breach of warranty of soundness: *Roberts v. Jenkins*, 21 N. H. 116; *Burton v. Young*, *supra*; "cribbiting," affecting the health: *Washburn v. Cuddihy*, 8 Gray (Mass.) 430; "permanent lameness:" *Brown v. Bigelow*, 10 Allen (Mass.) 242; "the glanders:" *Woodbury v. Robbins*, 10 Cush. (Mass.) 520; "Corns:" *Alexander v. Dutton*, 58 N. H. 282. "A warranty that a horse is 'sound and right,' is violated by his being a 'cribber:'" *Walker v. Hoisington*, 43 Vt. 608. See also *Kenner v. Harding*, 85 Ill. 264; *Morrill v. Bemis*, 37 Vt. 15; *Zimmerman v. Morrow*, 28 Minn. 367.

It frequently occurs that the express contract of warranty is modified or varied by the implied contract of usage of trade, that is to say, under certain circumstances an implied contract of usage enters into and becomes an element in the original contract of the parties. The principles in regard to the question of the implied contract of usage of trade, with respect to warranties, fall more appropriately under the head of implied contracts of warranty and are there discussed, and it will be sufficient here to give one case as an example of the subject. The case of *Marshall v. Perry*, 67 Me. 78, is a fair illustration of the principles of law that, in the United States, have been laid down with respect to usage. In that case, in an action for the price of a lot of butter, the defendant claimed a rebate in consequence of a breach of warranty of the quality of the butter; but the plaintiff insisted that, whether there was a warranty or not, defendant was impliedly bound by a usage of the trade at the place, to the effect that he was bound either to return the goods or give notice of the breach of warranty within a *specified time*, which, in this case, had admittedly not been done. The defendant was apparently ignorant of the usage. Held, overruling the court below, that the defendant was not bound by the usage. The court said: "The decisions as to the effect of usage upon contracts are not uniform; but we think the current of authorities in this country, both state and federal, establishes the proposition that local usage cannot be shown to contradict or vary the terms of a contract, express or implied, by law, or control

its interpretation and effect. Upon a careful examination of the cases apparently in conflict, it will be found that they do not differ so much in legal principles as in their application to particular cases. * * * Under the contract of warranty claimed by defendants, the rights and liabilities of the parties were fixed and well defined by the general principles of the common law. To authorize the defendants to maintain an action for breach of warranty, it was not necessary that they should examine the butter at once. * * * If they knew the usage * * * and made an express contract of warranty, it must be presumed that they were not satisfied with their rights and liabilities under the usage, and therefore made the express contract. * * * The usage was local. If not known to the parties, it could in no event affect their rights and liabilities." The following cases were cited by the court: *Dickinson v. Gay*, 7 Allen (Mass.) 29; *Dodd v. Farlow*, 11 Id. 426; *Potter v. Smith*, 103 Mass. 68; *Davis v. Galloupe*, 111 Id. 121; *Brown v. Foster*, 113 Id. 136; *Haskins v. Warren*, 115 Id. 514; *Collender v. Dinsmore*, 55 N. Y. 200; *Coxe v. Heisley*, 19 Pa. St. 243; *Wetherill v. Neilson*, 20 Id. 448; *Barnard v. Kellogg*, 10 Wall. 383; *Randall v. Smith*, 63 Me. 105; *Packard v. Earle*, 113 Mass. 280; *Walls v. Bailey*, 49 N. Y. 464; *Fisher v. Sargent*, 10 Cush. (Mass.) 250; *Dodge v. Favor*, 15 Gray (Mass.) 82.

An express warranty usually precludes the idea of an implied warranty, on the principle of *expressio unius est exclusio alterius*: *Wood v. Ashe*, 1 Strobb. (S. C.) 407; *Duff v. Ivy*, 3 Stew. (Ala.) 140; *Stucky v. Clyburn*, Cheves (S. C.) 186.

In *Wells v. Spears*, 1 McC. (S. C.) 421, however, it was said that, though the above was the general rule, yet, there were certain exceptions to it; and the court held that an express warranty of title did not exclude an implied warranty of soundness. See, also, *Hughes v. Banks*, Id. 537.

But a man may make an express warranty, where one would be implied, if nothing had been said: *Gill v. Kaufman*, 16 Kan. 571.

(b) *Exchange*.—In an exchange as well as a sale, it is not necessary to use the word warrant to bind the seller by a warranty, but the same rule that applies to sales governs exchanges in this respect: *Whitney v. Sutton*, 10 Wend. (N. Y.) 411; so in *Morgan v. Powers*, 66 Barb. (N. Y.) 35, it was held where, during the negotiations for the exchange of a cow for a mare, defendant told

plaintiff that the mare could work well enough, and described what work she actually did, that this was an affirmation of the ability of the mare to work, and constituted a warranty.

III. REMEDIES OF THE PARTIES.

Of the remedies of the seller, little need be said, as the law applicable to his right may be found fully discussed in any respectable book on contracts or sales. The remedies of the buyer, however, demand more consideration.

(a) *Remedies of the buyer; avoidance of the contract by fraud.*—The buyer has several remedies against the seller, and among the most common are those which are grounded on the seller's deceit. As we have already seen, the universal rule applicable to sales of personal property in the absence of an express or implied warranty is *caveat emptor*. But where the seller knowingly makes any false and material representations with respect to the subject-matter of the sale, the rule of *caveat emptor* no longer applies, but the buyer may refuse to receive the goods, or offer to return them when received, and rescind the contract because of the deceit, and if he has paid the price, recover it back: *Kimball v. Cunningham*, 4 Mass. 502; *Cozzins v. Whitaker*, 3 S. & P. (Ala.) 322; *Boorman et al. v. Jenkins*, 12 Wend. (N. Y.) 566; *Jack et al. v. R. R. Co.*, 53 Iowa 399; *Blythe v. Speake*, 23 Texas 430; *Stroud v. Pierce*, 6 Allen (Mass.) 413; *Freyman v. Knecht*, 78 Pa. St. 141. He may also retain the goods and, in an action for the price, avoid the plaintiff's right to recover by proof of the deceit and worthless character of the goods; or if the goods are not wholly worthless, he may show a diminution in their value in mitigation of damages. See *Beecker et al. v. Vrooman*, 13 Johns. (N. Y.) 302; and cases, *infra*. Or, finally, he may retain the goods and bring an action on the deceit: see *Loomis v. Cromwell*, 8 Law Rep. 546; *Cozzins v. Whitaker*, 3 S. & P. (Ala.) 322; *Blythe v. Speake*, 23 Texas 430; *McFarland v. Newman*, 9 Watts (Pa.) 55. And it has been decided that, though ordinarily parol evidence is not admissible to vary a written contract, yet where there is an allegation of fraud, such evidence will not necessarily be excluded, when it is offered to prove that the written evidence was fraudulently obtained: *Cozzins v. Whitaker*, 3 S. & P. (Ala.) 322. It is hardly necessary to add that where the buyer rescinds and returns the goods for the fraud of the seller,

he must do so within a reasonable time. See *Draper v. Sweet*, 66 Barb. (N. Y.) 145; *Horn v. Buck*, 48 Md. 358.

Where the buyer maintains a defence to an action for the price of goods on the ground of fraud, the same facts must be proved which would be necessary to maintain an action for damages for deceit in the sale of goods; see *King v. Eagle Mills*, 10 Allen (Mass.) 541. That is to say, the representation of the seller must be false, and it must also be proved that he knew of its falsity; see preceding case, also *Bond v. Clark*, 35 Vt. 577. The question was discussed at considerable length by STORY, J., in *Hough v. Richardson*, 3 Story 659, and at page 690, he said: "And here it is important to state that both facts must concur; there must be false and material representations, and the purchaser must have purchased upon the faith and credit of such representations. It is not necessary that he should have solely relied on these representations. It is sufficient if they constituted a part of the *res gestæ*, upon which he relied and without which the purchase would not have been made. There is another consideration applicable to the circumstances of the present case, which is fully sustained by the case of *Atwood v. Small*, in the House of Lords (6 Cl. & Fin. 232), and which, perhaps, cannot be more briefly expressed than it has been, with a slight addition, in the marginal note of the reporters. If, upon a treaty for the sale of property, the vendor makes representations (touching the nature and character and value of that property) which he knows to be false, the falsehood of which the purchaser has no means of knowing, but he relies on them, a court of equity will rescind a contract so entered into, although it may not contain the misrepresentations. But it will not rescind without the clearest proof of the fraudulent misrepresentations, and that they were made under such circumstances as show that the contract was based on them. But if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say, that he was deceived by the vendor's misrepresentations, the rule being *caveat emptor*, and the knowledge of his agents being as binding upon him as his own knowledge. Now, this doctrine is, in both its aspects, just as true as to gross misrepresentations, made by mistake, going to the essence of the bargain, as it is to the misrepresentation founded in fraud. I do not say, morally, but in construction of law. If the purchaser relies on

them and is deceived, he does not buy what he intended, and he is misled to do what he would not otherwise have done. But then, on the other hand, in cases of mistake, the bargain must have been made in strict faith and reliance upon such gross misrepresentations; and if the purchaser has acted upon his own judgment, uninfluenced by such misrepresentations, and has within his immediate reach full means of knowledge, and has declined to use those means, then he has no right to complain of his bargain. And here again the proof should be clear that there has been gross misrepresentations, and that the purchaser has been seduced into the bargain by them." The reader is also referred to the following cases for illustrations, and the language the courts have used upon the subject: *Hadley v. Clinton, &c., Co.*, 13 Ohio St. 502; *Stroud v. Pierce*, 6 Allen (Mass.) 413; *Stone v. Denny*, 4 Metc. (Mass.) 151; *Osgood v. Lewis*, 2 Md. 495; *Blythe v. Speake*, 23 Texas 430; *Patrick v. Leach*, 8 Neb. 530; *Larey v. Taliaferro*, 57 Ga. 443; *Bank v. Thayer*, 7 Fed. Rep. 622; *Wermer v. Clement*, 37 Pa. St. 143; *Lord v. Grow*, 39 Id. 88.

In *Ellis v. Andrews*, 56 N. Y. 83, however, it was held that a false statement, which the seller knowingly made with reference to the *value* of an article for the purpose of obtaining a *higher price*, would not sustain an action for fraud, by the purchaser who relied on it, on the ground that there is a broad distinction between a false affirmation of quality, or title, or soundness, and mere value, as in respect to the latter the purchaser must always be his own judge.

(b) *Actions for breach of warranty.*—Where there is no evidence of fraudulent representation but the seller is guilty of a breach of an express warranty, the buyer may proceed against him in an action on the case for the tort, or in assumpsit for breach of contract, immediately on the breach: *Freyman v. Knecht*, 78 Pa. St. 141; *Vail v. Strong*, 10 Vt. 457; *Bennett v. Tregent*, 24 U. C. C. P. 565; but in the case of an express warranty a *scienter* need not be laid, and need not be proved. See *House v. Fort*, 4 Blackf. (Ind.) 293; *Ross v. Mather*, 47 Barb. 582; *Chisholm v. Proudfoot*, 15 U. C. Q. B. 203; *Vanlear v. Earle*, 26 Pa. St. 277.

To entitle the plaintiff to recover in an action for an alleged breach of warranty, it is not necessary to return the goods: *Horn v. Buck*, 48 Md. 358; *Vincent v. Leland*, 100 Mass. 432; *Polhemus v. Heiman*, 45 Cal. 573; *Thompson v. Botts*, 8 Mo. 710;

Hughes v. Banks, 1 McC. (S. C.) 537; *Douglass Mfg Co. v. Gardner*, 10 Cush. (Mass.) 88; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Muller v. Eno*, 14 N. Y. 597; *Rust v. Eckler*, 41 Id. 488; *Day v. Pool*, 52 Id. 416; and in an action for the price, the defendant may give in evidence the breach of a warranty in diminution of damages and retain the goods: *Steigleman v. Jeffries*, 1 S. & R. (Pa.) 476; *Polhemus v. Heiman*, 45 Cal. 573; *Perley v. Balch*, 23 Pick. (Mass.) 283.

In some states for a breach of an express warranty, in the absence of fraud the buyer may rescind the contract and return the goods as in Massachusetts. See *Bryant v. Isburgh*, 13 Gray (Mass.) 607. In other states, however, the rule seems to be the other way, and the remedy is on the warranty alone, and in the absence of fraud the buyer cannot rescind the contract. See *Kase v. John*, 10 Watts (Pa.) 107; *Freyman v. Knecht*, 78 Pa. St. 141; *Rust v. Eckler*, 41 N. Y. 488; *Day v. Pool*, 52 N. Y. 416; *Reed v. Randall*, 29 N. Y. 358.

IV. MEASURE OF DAMAGE.—The measure of damage where the goods have not been returned, for a breach of warranty, is the difference between the actual value of the article sold, and the value of the article, had it conformed to the warranty: *Tuttle v. Brown*, 4 Gray (Mass.) 457; *Loomis v. Cromwell*, 8 Law Rep. 546; *Pinney v. Andrus*, 41 Vt. 632; *Freyman v. Knecht*, 78 Pa. St. 141; *Thornton v. Thompson*, 4 Grat. (Va.) 121; *Moulton v. Scruton*, 39 Me. 287; *Cary v. Gruman*, 4 Hill (N. Y.) 625; *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166; *Cothers v. Keever*, 4 Pa. St. 168; *Tatum v. Mohr*, 21 Ark. 351; and it has been held that the price paid is strong evidence of what the article would have been worth, if sound: *Cary v. Gruman*, *supra*; *Thornton v. Thompson*, *supra*; *Reggio v. Braggiotti*, *supra*. Where the goods have been returned, the measure of damage would be the whole price. See *Kimball v. Cunningham*, 4 Mass. 502; *Conner v. Henderson*, 15 Mass. 319. So also where the goods prove utterly worthless the same rule would probably apply: see *Williamson v. Carnaday*, 3 Ired. (N. C.) 349; *Conner v. Henderson*, *supra*. Where the seller sues for the price, the buyer may, as we have seen, prove the breach of warranty, in reduction of damages: *Harrington v. Stratton*, 22 Pick. (Mass.) 510; *Mixer v. Coburn*, 11 Mete. (Mass.) 561; *Dorr v. Fisher*, 1 Cush. (Mass.) 271.

Where, however, the action by the seller against the buyer is not on the price of the goods, but on the *security* given for them, as for instance a note or bill given in payment, it would seem that, according to the English rule, the purchaser has no defence, even *pro tanto*, where the goods are warranted of a particular description, and turn out to be of an inferior description; though he may defend the action *in toto* if the consideration has totally failed, provided that he has repudiated the contract; the reason being that the instrument is in its nature new, and the remedy is therefore by cross action: 1 Chitty on Contracts, 11 Am. ed., at page 653; and in such cases it may be that it is not necessary to show a return, that is where the failure of consideration is total: *Burton v. Stewart*, 3 Wend. (N. Y.) 236; *Perley v. Balch*, 23 Pick. (Mass.) 283. In the United States, however, it has been held that in a suit by the payee of a note given for the price of a chattel, it is competent for the maker to prove in reduction of damages, that the sale was effected by means of false representations on the part of the payee, without a return of the goods sold: see *Harrington v. Stratton*, 22 Pick. (Mass.) 510; *Perley v. Balch*, 23 Id. 283; *Burton v. Stewart*, 3 Wend. 236; *Coburn v. Ware*, 30 Me. 203; *Raspberry v. Moyer*, 23 Miss. 320; *Albertson v. Holloway*, 16 Ga. 377; 1 Chitty, *supra*, notes.

ARTHUR BIDDLE.

RECENT AMERICAN DECISIONS.

Ohio Supreme Court Commission.

UNION MANUFACTURING CO. v. MORRISSEY.

M., while using a machine in his capacity of workman for a manufacturing company, acquired a knowledge of its defects and consequent unsafe condition. He complained of its condition to the foreman, under whose orders he was working, and whose duty it was to see that the machinery was kept in good order and repair. The foreman promised him to remedy said defects, and directed him to go to work on the machine. The workman thereupon remained in the service of the company, and continued to use the machine and, in so doing, was injured through its said defects before any steps were taken to remedy the same.

Held, That the workman's knowledge of the defects in the machine was not, under the circumstances and as a matter of law, conclusive of contributory negligence on his part; but it was a fact in the case to be taken into consideration by the jury, with all the other facts and circumstances, in determining the question, whether the workman's own negligence contributed to the accident by which he was injured.